

ESTTA Tracking number: **ESTTA726544**

Filing date: **02/11/2016**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91215512
Party	Plaintiff Body Vibe International, LLC
Correspondence Address	THOMAS P PHILBRICK ALLMARK TRADEMARK 2089 AVY AVE MENLO PARK, CA 94025 UNITED STATES tom@allmarktrademark.com, allmarktrademark@gmail.com
Submission	Motion for Sanctions
Filer's Name	Thomas P. Philbrick
Filer's e-mail	tom@allmarktrademark.com, allmarktrademark@gmail.com
Signature	/Thomas P. Philbrick/
Date	02/11/2016
Attachments	Motion for discovery sanctions and entry of default 02112016.pdf(580043 bytes ) Exhibit A tab.pdf(8719 bytes ) TTAB order granting Dr Vape motion to compel 12162015.pdf(60831 bytes ) Declaration for discovery sanctions entry of default motion 02112016.pdf(439259 bytes ) Certificate of Service for motion for discovery sanctions default 02112016.pdf(118327 bytes )



1. On January 23, 2015, Opposer served its First Set of Interrogatories to Applicant (“Interrogatories”) and Opposer’s First Set of Requests for Production of Documents and Things directed to Applicant. (“Document Requests”) No response was ever received to either form of discovery.
2. Opposer’s extensive meet and confer efforts to attempt to receive appropriate discovery responses from Applicant were ignored.
3. As a result of Applicant’s complete failure to respond to interrogatories and document requests in any manner, Opposer was forced to file a Motion to Compel Discovery on October 30, 2015. Opposer’s Motion to Compel Discovery was granted by order of the Board on December 16, 2015. (A copy of this order is attached as **Exhibit A**)
4. We are now over 30 days since the Board order of December 16, 2015 compelling discovery and no discovery responses (either interrogatory or document production) have been provided to Opposer. This lack of response is in clear violation of the December 16, 2015 Order. (See Declaration of Thomas P. Philbrick, ¶ 8)

## **B. Argument**

5. In the event that a party fails to comply with a discovery order of the Board, “the Board may make any appropriate order, including any of the orders provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure.” See 37 C.F.R. §2.120(g)(1). One such order, which would be appropriate for failure to obey a discovery order, is the issuance of a default judgment against the disobedient party. [See F.R.C.P. 37(b)(2)(A)(vi)]
6. While entry of default judgment is a harsh remedy, Opposer submits that it is appropriate in situations like this where a party has repeatedly ignored the opposing party’s requests for

discovery and completely disregarded an order of the Board compelling such discovery. (See TBMP 527.01(a) Note 6. MHW Ltd. v. Simex, Aussenhandels-gesellschaft Savelsberg KG, 59 USPQ 2d 1477, 1478-1479 (TTAB 2000))

7. Opposer notes that the present state of events is similar to MHW Ltd. which involved one party failing to respond to the other's requests for discovery and subsequently ignoring the Board's Order compelling such discovery. Judgment of default was entered in that case by the Board. (*Id.* at 1477-1478)

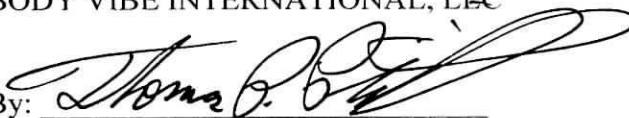
8. Opposer submits that because Applicant has blatantly disregarded all of Opposer's requests for discovery, ignored a discovery order of the Board and unnecessarily delayed this proceeding, the entry of judgment against Applicant is warranted and more than justified under the circumstances.

9. WHEREFORE, Opposer prays that the Board issue an order entering default judgment against Applicant and sustaining the instant Opposition proceeding in favor of Opposer. Opposer requests that proceedings be suspended pending the disposition of this motion and that trial dates be reset in the event that the motion is denied.

DATED this 11<sup>th</sup> day of February, 2016.

Respectfully submitted,

BODY VIBE INTERNATIONAL, LLC

By: 

Thomas P. Philbrick, Esq.  
John E. Russell, Esq.  
Attorneys for Opposer

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## EXHIBIT A

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451  
General Contact Number: 571-272-8500

mw/lg

Mailed: December 16, 2015

Opposition No. 91215512

*Body Vibe International, LLC*

*v.*

*David Cox*

**Denise M. DelGizzi,  
Chief Clerk of the Board**

On October, 30, 2015, Opposer filed a motion to compel responses to discovery requests. The record showing no response by Applicant to Opposer's motion (filed October 30, 2015) to compel discovery, the motion is granted as conceded. See Trademark Rule 2.120(e) and 2.127(a).

A party that fails to respond to interrogatories or document requests during the time allowed therefor, and that is unable to show that its failure was the result of excusable neglect, may be found, upon motion to compel filed by the propounding party, to have forfeited its right to object to the discovery request on its merits. *See No Fear Inc. v. Rule*, 54 USPQ2d 1551 (TTAB 2000); TBMP § 403.03.

Applicant is permitted until **thirty days** from the mailing date of this order to provide complete responses to Opposer's interrogatories and document requests. Moreover, Applicant's responses must be made without objection because Applicant failed either to timely respond or to object to Opposer's discovery requests. *See No*

*Fear Inc. v. Rule*, 54 USPQ2d 1551 (TTAB 2000). Should Applicant fail to provide the ordered responses, Opposer's remedy will lie in a motion for entry of sanctions, in the form of entry of judgment sustaining the opposition. See Trademark Rule 2.120(g).

Proceedings are hereby resumed and dates are reset as indicated below:

Discovery Closes	<b>1/13/2016</b>
Plaintiff's Pretrial Disclosures	<b>2/27/2016</b>
Plaintiff's 30-day Trial Period Ends	<b>4/12/2016</b>
Defendant's Pretrial Disclosures	<b>4/27/2016</b>
Defendant's 30-day Trial Period Ends	<b>6/11/2016</b>
Plaintiff's Rebuttal Disclosures	<b>6/26/2016</b>

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125. Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re application serial no. 85966358 (DR. VAPE)

Filed on June 21, 2013

BODY VIBE INTERNATIONAL, LLC

Opposer,

v.

Cox, David

Applicant.

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Trademark Trial and Appeal Board  
United States Patent and Trademark Office  
P.O. Box 1451  
Alexandria, VA 22313-1451

**DECLARATION OF THOMAS P. PHILBRICK IN SUPPORT OF OPPOSER'S  
MOTION FOR DISCOVERY SANCTIONS AND FOR ENTRY OF DEFAULT  
JUDGMENT AGAINST APPLICANT**

I, THOMAS P. PHILBRICK, declare as follows:

1. I am over the age of 18 and I am a partner with ALLMARK TRADEMARK, attorneys for Opposer, BODY VIBE INTERNATIONAL, LLC ("Opposer") in the above captioned proceeding.
2. Except as otherwise stated, I make this declaration on personal knowledge in support of Opposer's Motion for Discovery Sanctions and for Entry of Default Judgment Against Applicant.
3. On March 19, 2014, Opposer commenced this opposition action against Applicant's application serial number 85966358 for the mark DR. VAPE.

5. On January 23, 2015, Opposer served its First Set of Interrogatories (“Interrogatories”) and its First Set of Requests for Production of Documents and Things (“Document Requests”) on the Applicant’s then counsel of record, Mark Hubert. (See *Interrogatories* and *Document Requests* attached as exhibits to Motion to Compel that was filed with the Board on October 30, 2015)

6. To date, no responses of any kind have been received by Opposer in connection with the aforementioned discovery.

7. Due to the complete lack of any responses to interrogatory and request for document production discovery, Opposer filed a Motion to Compel with the Board on October 30, 2015. On December 16, 2015, the Board granted Opposer’s Motion to Compel and provided Applicant 30 days to respond to the outstanding discovery without objection.

8. Since the Board’s December 16<sup>th</sup> order, Opposer has received no responses of any kind from Applicant. As such, it is apparent that Applicant is not willing to participate in the discovery process.

9. It is well past the 30 day response period provided in the Board’s December 16<sup>th</sup> order, and no responses have been received by Opposer to its discovery propounded on Applicant.

10. Opposer believes that a sanction in the form of entry of default judgment against the Applicant is appropriate given his complete failure to cooperate in the discovery process in any manner, including the violation of an order of the Board compelling discovery.

**I HEREBY CERTIFY** that the above statements are true. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 17<sup>th</sup> day of February, 2016.

Respectfully submitted,

BODY VIBE INTERNATIONAL, LLC

By: 

Thomas P. Philbrick, Esq.

John E. Russell, Esq.

Attorneys for Opposer

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### CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **OPPOSER'S MOTION FOR DISCOVERY SANCTIONS AND FOR ENTRY OF DEFAULT JUDGMENT AGAINST APPLICANT (and REQUEST FOR SUSPENSION OF PROCEEDINGS PENDING DISPOSITION OF MOTION) and accompanying DECLARATION** has been served on Applicant's address of record by mailing said copy on February 11, 2016 via First Class Mail, postage fully prepaid to:

David Cox  
2359 Erma Ct.  
Springfield, OR 97477

By:

A handwritten signature in black ink, appearing to read "Thomas P. Philbrick", written over a horizontal line.

Thomas P. Philbrick

Dated:

February 11, 2016